80-262

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

NORMAN F. DACEY
Petitioner

v.

JOHN P. COTTER, JOSEPH W. BOGDANSKI,
ALVA P. LOISELLE, JOSEPH S. LONGO
and ELLEN A. PETERS
Respondents

and

NORMAN F. DACEY
Petitioner

v.

HENRY J. NARUK
Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

Norman F. Dacey
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Bridgeport, CT 06605
Petitioner, pro se

QUESTIONS PRESENTED FOR REVIEW

1. Was the successful plaintiff in an earlier trial of a libel action against the Connecticut Bar Association denied due process in the retrial of that action when a state trial court judge, who would have been required to contribute to the damages and costs awarded to such plaintiff, declined to observe Connecticut's statutory prohibition against any judge sitting on an action in which he "may be required to contribute to the damages, costs or expenses" thereof when, in fact, a number of non-disqualified judges were available and the Chief Administrative Judge of the State had given the plaintiff an assurance that a non-disqualified judge would be named to preside on the case?

2. Is the successful Plaintiff in an earlier trial of a libel action against the Connecticut Bar Association being denied due process in the retrial of that action when the five justices of the Connecticut Supreme Court, each of whom would be required to contribute to such Plaintiff's judgment and damages, have declined to observe Connecticut's statutory prohibition against any judge sitting on an action in which he "may be liable to contribute to the damages, costs and expenses" thereof, when, in fact, they had the option of recusing themselves and allowing the governor to appoint five temporary Supreme Court judges to sit in their stead or exercising their own statutory powers to appoint non-disqualified judges to sit in their place and hear the appeal?

3. Did the District Court err in denying its own

its own jurisdiction in a Title 42 U.S.C. Sections 1983 and 1985 action properly requesting injunctive relief from such unconstitutional acts upon the part of state courts, which acts were causing great and immediate irreparable harm to the Plaintiff?

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

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STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Title 28, U.S. Code Section 1254 (1) confers upon this Court jurisdiction to review denials of motions for reconsideration and requests for rehearing en banc by a United States Court of Appeals, when such denials are inconsistent with the thrust of countless decisions on similar issues by this Court and other U.S. Courts of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES AND CANONS WHICH THE CASE INVOLVES

1. Section 51-39 of the Connecticut General Statutes provides inter alia:

> "When there is so near a relationship between any judge and any party in any proceeding in court before him, or when any judge may be liable to contribute to the damages, costs or expenses of any... proceeding, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act."

2. Section 51-207 of the Connecticut General Statutes provides inter alia, that

> "Each of the parties in any case shall have the right to be heard by a full court.... If any judge is...disqualified and the ... disqualification is not waived...the chief justice or, in his absence, the senior judge present...may summon the sixth member of the said court or one or more judges of the superior court to constitute a full court, who shall attend and act as judges of the supreme court for the time being."

3. Canon 3, Code of Judicial Conduct, provides, inter alia:

> "C. Disqualification
>
> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where....
>
> '(c) he knows that he individually... has a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding..."

4. Title 42, U.S. Code Section 1983 provides, inter alia:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage...subjects, or causes to be subjected, any citizen of the United States

or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress."

5. Title 42, U.S. Code Section 1985 provides, inter alia:

"In any case of conspiracy set forth in this section if one or more persons engaged therein do, or cause to be done, any act in furtherance of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

6. Title 28, U.S. Code Section 455 provides, inter alia:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein (emphasis added)."

7. Title 18, U.S. Code Section 241 provides inter alia:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same...they shall be fined not more than $5,000, or imprisoned not more than ten years, or both."

8. Title 18, U.S. Code Section 242 provides, inter alia:

"Whoever, under color of law, statute or regulation, ordinance or custom, wilfully subjects an inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.... shall be fined no more than $1,000 or imprisoned for one year, or both."

9. Title 42, U.S. Code 1986 provides, inter alia:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding Section [1985 Title 42] are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses to do, if such wrongful act be committed shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action."

STATEMENT OF THE CASE

Plaintiff/Appellant Dacey's action for libel instituted in 1967 against the Connecticut Bar Association resulted, on June 13, 1974, in a jury finding that the Defendant Association had in fact maliciously libeled him, and an award of $60,000 damages plus $8,500 counsel fees. By the terms of the judgment, each member of the Defendant Association was required to pay a prorata share of the damages awarded.

The Association appealed the judgment on technical grounds to five of its own members sitting as the Justices of the Supreme Court of Connecticut. Dacey cited to the Justices Section 51-39 of the Connecticut General Statutes which provides inter alia:

> "When there is so near a relationship between any judge and any party in a proceeding in court before him...or when any judge may be liable to contribute to the damages, costs, or expenses of any proceedings, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act (emphasis added)."

Dacey also cited Canon 3 of the Code of Judicial Conduct which prohibits a judge from presiding on any action in which he has a pecuniary interest or in which his impartiality might reasonably be questioned, and moved that they recuse themselves. All refused. Instead, on December 2, 1974, they heard the appeal, reversed the jury verdict on April 3,

1975 and ordered the action retried.

On March 10, 1977, Dacey requested the Hon. John P, Cotter, Chief Administrative Judge Connecticut, to cause the retrial to be assigned to a judge who was not a member of the Defendant Connecticut Bar Association. The Chief Administrative Judge replied on March 17, 1977:

> "There are a number of judges who are not members of the Connecticut Bar Association who would be in a position to try this case. I am, therefore, sending a copy of your letter to the Hon. Irving Levine, Acting Administrative Judge of the Superior Court in Fairfield County at Bridgeport, to resolve the matter. (See AppendixB-1)

Retrial of the action began on May 27, 1977, with Superior Court Judge Henry J. Naruk presiding. When asked at a pretrial conference in chambers to confirm that he was not a member of the Defendant Association, he acknowledged that, in fact, he was a member, whereupon Section 51-39 of the Statutes was cited to him and he was asked to recuse himself. He declined to do so. Dacey's counsel then indicated that he expected Judge Naruk to disclose to the jury the fact of his membership in the Association. Judge Naruk refused. Counsel then advised Judge Naruk that in his own argument to the jury he would feel it incumbent upon him to disclose the fact of the judge's membership, whereupon Judge Naruk stated that if counsel took such action, he would immediately declare a mistrial. In the Request to Charge, Plaintiff's counsel asked again that Judge Naruk reveal his membership in the Defen-

dant. Judge Naruk again refused.

During the voir dire, Judge Naruk systematically used his power to exclude as a juror any individual who, under his close questioning, acknowledged that he had ever heard of Dacey. Since, for more than ten years, the case of Dacey v. Connecticut Bar Association had been the subject of front page news stories, newspaper editorials critical of the Bar Association, and radio and television coverage, Judge Naruk's action had the only possible result: the selection as jurors of seven persons whose interests and mental processes were such that they were ignorant of day-to-day happenings in the world around them.

During the trial, Judge Naruk refused to allow Dacey to introduce important evidence, including a New York Court of Appeals decision which utterly refuted the testimony of the Defendant Association's "expert witnesses" and destroyed their credibility. When Dacey informed the court that the key piece of evidence, Exhibit A, had been tampered with and asked that the verdict be set aside, the court refused. As the trial ended, the Plaintiff discovered that the "new partner" whom his counsel had acquired during the pre-trial period of preparation had come directly from a partnership in the law firm defending the Bar Association. When the trial ended, the "partnership" was dissolved.

Plaintiff/Appellant then filed Dacey v. Naruk in the U.S. District Court for Connecticut, seeking injunctive relief from Judge Naruk's deprivation of Dacey's constitutional right to a fair trial before an unbiased tribunal. The District Court ignored

the request for injunctive relief, ruling only that the Defendant enjoyed judicial immunity from a civil suit for damages. (See Appendix C-1) Learning that District Judge Newman was himself a member of the Defendant Association and thus a party to the action, a fact which he chose not to voluntarily reveal, Dacey filed an Affidavit of Prejudice pursuant to 28 U.S.C. Section 144, whereupon the District Judge vacated his order and recused himself. The matter was referred to District Judge Murphy who summarily dismissed it on the merits whithout a hearing. (See Appendix D-1)

Meanwhile the state case went on appeal again to the Connecticut Supreme Court, consisting of two of the justices who had heard the earlier appeal plus three new members. All five were members of the Defendant Association and each had been required by the first trial jury to contribute to the $60,000 damages awarded the Plaintiff. Plaintiff repeatedly requested excerpts of the transcript for purposes of the appeal. Such requests were ignored and he was forced to proceed without the information in such transcript. On June 21, 1979, the Connecticut statute prohibiting their presiding was cited to the Justices and they were asked to recuse themselves. They refused. Plaintiff/Appellant then filed Dacey v. Cotter, et al in the U.S. District Court asking for injunctive relief from this new deprivation of his constitutional right to a fair trial before an impartial tribunal and from the Justices' failure to honor state statute Section 51-39 prohibiting their participation in an action in which they had a personal or pecuniary interest. The District Court ruled that it lacked jurisdiction to intervene in a state court action. (See Appen-

dix F-1)

Both Dacey v. Naruk and Dacey v. Cotter, et al were then appealed to the United States Court of Appeals for the Second Circuit, which elected to join the cases. Argument was set for February 29, 1980, and two and one-half minutes was allowed for each case. Upon receipt of notice of such hearing, Plaintiff made prompt application to Associate Justice Thurgood Marshall for a Writ of Mandamus requiring the Appeals Court to allow a more reasonable time for argument, which application was denied on March 24, 1980, nearly one month after the date of the hearing in connection with which relief was sought.

On March 3, 1980, the U.S. Court of Appeals affirmed the decisions of the District Court in Dacey v. Naruk and Dacey v. Cotter, et al. (See Appendix G-1)

U.S. Court of Appeals Judge William H. Timbers, formerly for many years a member of the Connecticut Bar Association, failed to disclose to the plaintiff the fact of such membership thus denying Dacey the opportunity to file an Affidavit of Prejudice pursuant to 28 U.S.C. § 144. Dacey filed timely motions for reconsideration and petitions for rehearing en banc in both cases. On May 13, 1980, the motions and petitions were denied.

Jurisdiction over the instant actions was conferred upon the District Court by Article I, Section 2 of the Constitution of the United States and by Title 28, Section 1343 of the United States Code.

By agreement with the Plaintiff/Appellant, the Justices of the Connecticut Supreme Court have deferred their hearing of the appeal until this Court has had an opportunity to consider the facts and make a determination of whether or not their refusal to recuse themselves constitutes a deprivation of Dacey's constitutional right to due process -- that is, to a fair trial before an impartial tribunal.

ARGUMENT

1. WAS THE SUCCESSFUL PLAINTIFF IN AN EARLIER TRIAL OF A LIBEL ACTION AGAINST THE CONNECTICUT BAR ASSOCIATION DENIED DUE PROCESS IN THE RETRIAL OF THAT ACTION WHEN A STATE TRIAL COURT JUDGE, WHO WOULD HAVE BEEN REQUIRED TO CONTRIBUTE TO THE DAMAGES AND COSTS AWARDED THE PLAINTIFF, DECLINED TO OBSERVE CONNECTICUT'S STATUTORY PROHIBITION AGAINST ANY JUDGE SITTING ON AN ACTION IN WHICH HE "MAY BE REQUIRED TO CONTRIBUTE TO THE DAMAGES, COSTS OR EXPENSES" THEREOF WHEN, IN FACT, A NUMBER OF NON-DISQUALIFIED JUDGES WERE AVAILABLE AND THE STATE'S CHIEF ADMINISTRATIVE JUDGE HAD GIVEN THE PLAINTIFF AN ASSURANCE THAT A NON-DISQUALIFIED JUDGE WOULD BE APPOINTED TO PRESIDE ON THE CASE?

Section 51-39 of the Connecticut General Statutes could not be more specific:

> "...[W]hen any judge may be liable to contribute to the damages, costs or expenses of any proceedings...he shall be disqualified to act."

Since Plaintiff Dacey had earlier won a $60,000 judgment (plus $8,500 counsel fees) against the Connecticut Bar Association, of which the Defendant in Dacey v. Naruk was a member and to which judgment he would have been required to contribute, it is beyond argument that such Defendant fell within the purview of Section 51-39 and was thus disqualified from sitting on the case. He was "liable to contribute" and thus had no alternative but to recuse himself. He refused to do so.

The Defendant cannot claim that he had a "duty to sit" for there were a number of judges of the Connecticut Superior Court who were not disqualified, by reason of membership in the Connecticut Bar Association, from hearing the case.

On March 17, 1977, the Hon. John P. Cotter, the Chief Administrative Judge of Connecticut, in response to Dacey's earlier written request for the assignment of a non-Bar Association member to preside at the rehearing, wrote (see Appendix A-1,B-1) that:

> "There are a number of judges who are not members of the Connecticut Bar Association who would be in a position to try this case. I am therefore sending a copy of your letter to the Honorable Irving Levine, Acting Administrative Judge of the Superior Court of Connecticut in Fairfield County at Bridgeport to resolve this matter."

In attesting to the fact that there were judges who were not members of the Bar Association and who would therefore be in a position to try the case, Justice Cotter was clearly implying that Judges who were members of the Association were not in a position to try the case.

Defendant Naruk had taken an oath to support and defend the Constitution and laws of the United States and of the State of Connecticut. In Harris v. McRae, ___U.S.___, 48 LW 4941 (1980), this Court has ruled that the deliberations of a state legislature and the resulting laws are to be considered as reflecting the will of the people of the state and are not to be overturned capriciously:

"It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will inquire first into the statutory question."

In Dacey v. Naruk, there is no question of the applicability of the state statute -- it specifically applied to judges and it was clearly the intention of the state legislature to protect the due process rights of the state's citizens by deterring any judge from sitting on a case in which he had a personal or pecuniary interest.

Plaintiff submits that this Court should find that Defendant Naruk has violated the very state law he took an oath to defend.

As for the federal statutory question, 42 U.S.C. §§ 1983 et seq. forbids any state officer, including judges, from denying any citizen due process of law.

From a constitutional standpoint, the 5th and 14th Amendments' requirement of due process of law has been interpreted by this Court in Mayberry v. Penna. 91 S.Ct. 499 to mean that every litigant is entitled to an impartial tribunal as an essential element of due process of law. In Tumey v. State of Ohio, 273 U.S. 510 (1927), this Court held that it is a violation of due process for a judge to decide a case in which he has a direct personal or pecuniary interest, and this decision has never been overturned or challenged.

In Gibson v. Berryhill, 411 U.S. 564 (1973) this Court ruled that "judges with pecuniary interests in legal proceedings should not adjudicate the dis-

putes." In Commonwealth Coat Corporation v. Continental Casulaty Co., 89 S. Ct. 337 (1968), it was held that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias arising from the relationship between the tribunal and a party to the action.

Three years ago, the Fifth Circuit spelled out the requirements of "due process" with respect to judicial impartiality in these terms:

> "The integrity of the judicial process requires that a judge wholly unconnected with [the parties to the litigation] should sit on the case. Due process requires no less." In Re Martin, C.A. 5th, 5 Crim. 3151, June 30, 1977.

An earlier Connecticut Supreme Court ruled:

> "It is a well-recognized principle of natural justice that a man ought not to be a judge in his own case. Ellis v. Emhart Mfg. Co., 150 Conn. 501, 555.

Thus, on statutory grounds, on constitutional grounds and on the record of case law, Defendant Naruk should have recused himself.

One particularly reprehensible aspect of the conduct of the Defendants in both Dacey v. Naruk and Dacey v. Cotter et al involves their participation in a transparent scheme to evade the letter and the spirit of Section 51-39 of the state's General Statutes through negotiation with the Board of Governors of the Connecticut Bar Association for the passage of a "special resolution" purport-

ing to grant to any judge or justice sitting on any phase of Dacey v. Conn. Bar Association a remission of his association dues equal to any amount he might be called upon to contribute to the damages in the action. The very passage of the resolution constituted an acknowledgment that each of the judges had a pecuniary interest in the action.

But Connecticut has no integrated bar, and the Connecticut Bar Association is not an arm of the state government. It is a private trade union to which some 3,000 Connecticut attorneys choose not to belong. It has no authority to alter the application of Connecticut law to its members or to confer upon them any special immunity. History confirms Justice Hugo Black's statement that the struggle for a written Constitution was "to make certain that men in power would be governed by law, not the arbitrary fiat of the man or men in power." From Raoul Berger's article "The Imperial Court" New York Times, October 9, 1977.

Only the legislature can change the law. The Association and these Defendants acting "under color of law," are openly defying what is, so far as Connecticut is concerned, the law of the land which they are sworn to uphold. The actions of the Board of Governors of the Association and the Defendant judges constitute a blatant violation of 42 U.S.C. § 1985 in that they represent a conspiracy to deprive Dacey of his civil rights and of the fruits of a fair and just consideration of his case by a jury of his peers and to substitute for the findings of such a jury the biased rulings of members of the judiciary who are themselves parties to the action and who have, in fact,

already been adjudged liable by the first jury and ordered to pay the Plaintiff substantial damages.

Whatever may have been its intent, poor draftsmanship has caused the "special resolution" to fail in its purpose. It provides remission only of an amount which the judge or justice may be called upon to contribute to the damages in the Dacey action, but makes no mention of costs or fees for the thirteen years' services of the prestigious law firm which has handled the Association's defense. Furthermore, a "remission" of dues equal to the amount they have been called upon to contribute is a form of refund of monies they were in fact required to pay out, whereas the statute states "When any judge may be liable to contribute, etc." The "special resolution" does not remove the liability but merely reimburses the Defendants for sums paid out.

The retrial of Dacey v. Connecticut Bar Association was steeped in legal impropriety. The action of the trial judge (Naruk) in rejecting as jurors all those candidates who betrayed any awareness of day-to-day happenings in the world around them was calculated to result in a jury whose collective intellectual awareness was such that it provided the Plaintiff with something less than a jury of his peers.

During the period of preparation for the retrial, Plaintiff's counsel had acquired a "new law partner." During the retrial, counsel declined to respond to the Plaintiff's urgings that he pursue the issues more vigorously. Only when the trial was over did the Plaintiff discover that the "new partner" had come directly from a partnership in the law firm which was defending the Bar Assoc-

iation. Shortly after the trial, the "new partnership" was dissolved.

For the State of Connecticut to require Dacey to rely upon the rulings of a trial judge inseparable from one of the parties to the action is to deny him due process of law and equal protection under the laws. The Plaintiff's claim against the Defendant Association constitutes a property right within the meaning of the Fourteenth Amendment. It is a violation of that Amendment to deprive him of that right without a fair trial before an impartial tribunal.

Plaintiff contends that these denials of due process are too blatant to be swept under the carpet. This Court's ignoring of them will be seen by the public as an endorsement of such conduct and an evidence that we are governed by men in power and not by laws.

2. IS THE SUCCESSFUL PLAINTIFF IN AN EARLIER TRIAL OF A LIBEL ACTION AGAINST THE CONNECTICUT BAR ASSOCIATION BEING DENIED DUE PROCESS IN THE RETRIAL OF THAT ACTION WHEN THE FIVE JUSTICES OF THE CONNECTICUT SUPREME COURT, EACH OF WHOM WOULD BE REQUIRED TO CONTRIBUTE TO SUCH PLAINTIFF'S JUDGMENT AND DAMAGES, HAVE DECLINED TO OBSERVE CONNECTICUT'S STATUTORY PROHIBITION AGAINST ANY JUDGE SITTING ON AN ACTION IN WHICH HE "MAY BE LIABLE TO CONTRIBUTE TO THE DAMAGES, COSTS AND EXPENSES" THEREOF, WHEN, IN FACT, THEY HAD THE OPTION OF RECUSING THEMSELVES AND ALLOWING THE GOVERNOR TO APPOINT FIVE TEMPORARY SUPREME COURT JUDGES TO SIT IN THEIR

STEAD OR EXERCISING THEIR OWN STATUTORY POWERS TO APPOINT NON-DISQUALIFIED JUDGES TO SIT IN THEIR PLACE?

The proscriptions inherent in Section 51-39 of the Connecticut General Statutes are as applicable to the Justices of the Connecticut Supreme Court as to the judge in the trial court. Each justice falls within the purview of the statute and is thus disqualified to sit on the Plaintiff's appeal from the judgment of the illegitimate trial court. An illegitimate relationship cannot produce a legitimate child.

The Justices of the Connecticut Supreme Court have collectively denied the motion of the Plaintiff that they recuse themselves. But no more than Nixon may that court claim that "when the Court does it, it is legal." (Raoul Berger) The Constitution exalts conformity with it above the demands of justice; judges are not sworn to do justice but "to support this Constitution." Over the lintel of the Supreme Court in Washington is inscribed "Equal Justice Under Law." Chief Judge Benjamin Cardoza wrote that judges do not have "the right to ignore the mandate of a statute, and render judgment in spite of it." We must not equate the assertion of power with its legitimacy.

It is ironic that it is the same John P. Cotter who, as Chief Administrative Judge of the State of Connecticut, acknowledged that members of the Connecticut Bar Association were not in a position to sit on the trial of Dacey v. Connecticut Bar Association, who is now the Chief Justice of the Connecticut Supreme Court and thus the architect of its blatant disregard for state law and the Constitution of the United States.

The five Justices have claimed that they have a "duty to sit." But that is not so, for as Chief Justice Cotter acknowledged, there are many judges of the Superior Court who are not members of the Defendant Association and who could therefore be appointed to sit on the appeal. The four men and one lady who constitute the court are not indispensable.

In Mosk v. Superior Court of Los Angeles, L.A. 31140 (1979), and a companion case, Commission on Judiciary Performance v. Court of Appeals for the Second District, L.A. 11134, six of the seven members of the California Supreme Court disqualified themselves on the grounds of personal interest and the Governor appointed six lower-court judges to sit in their stead on a temporary basis. The six substitute judges then voted unanimously that the one remaining Supreme Court Justice who had refused to disqualify himself, was in fact disqualified and he was required to recuse himself, whereupon the Governor appointed a seventh substitute to sit in his place. Thus, every member of the California Supreme Court disqualified himself even though in California there was no equivalent of Connecticut Statute 51-39. Like the recalcitrant Justice Mosk in California, the five members of the Connecticut bench have clung stubbornly to their avowed course of sitting, though disqualified.

Another Connecticut statute, § 51-207, bears upon this situation, providing, inter alia, that

> "Each of the parties in any case shall have the right to be heard by a full court....If any judge is...disqualified and the ...disqualification is not waived...the chief justice or, in his absence, the senior judge present...may

summon the sixth member of the said court or one or more judges of the superior court to constitute a full court, who shall attend and act as judges of the supreme court for the time being."

From the foregoing, it is obvious that it lies within the power of Chief Justice Cotter to appoint whatever number of non-Association member judges are required to provide an unbiased tribunal. And, indeed, he has done so upon numerous occasions in the past. When a Connecticut citizen, Nadine Monroe, filed an appeal to the Connecticut Supreme Court challenging the constitutionality of a Connecticut statute (Connecticut Law Journal Vol. XL, No. 39, March 27, 1979), two justices disqualified themselves and Chief Justice Cotter appointed two Superior Court judges to sit in their place for the purpose of adjudicating the plaintiff's appeal. In Connecticut Light and Power v. Public Utilities et al (Connecticut Law Journal Vol Xi, No. 14, October 3, 1978), the case was heard by one regular Supreme Court Justice, two judges of the Superior Court and two retired judges of the Superior Court. In State v. Tedesco (Connecticut Law Journal, Vol. XXXiX, No. 50, June 13, 1978), the Supreme Court panel consisted of three Superior Court judges and only two regular Supreme Court Justices.

But when one of the parties is the Connecticut Bar Association and their individual pocketbooks are at risk, the Justice Defendants sanctimoniously cite that hoary old chestnut, Evans v. Gore, 253 U.S. 245, 247-248 (1920) that "When all are disqualified, none is disqualified," which may be

roughly equated with "When all are thieves, none is a thief."

In seeking to excuse its deprivation of Dacey's constitutional right to a fair trial before an unbiased tribunal, the Connecticut Supreme Court has claimed that in any case, the liability of the individual members is de minimis. But the statute does not specify "a substantial interest," or even "a significant interest" -- it simply says that when any judge may be liable to contribute any amount to the damages, costs and expenses of an action, he shall be disqualified. This Court has ruled in Snaidach v. Family Finance, 89 S. Ct. 1980, that the sum of $3.00 is not de minimis.

In the section on "Constitutional Law" in Lord Halsbury's Law of England (1955) Vol. 2, p. 67, we read:

> "It is an elementary principle that no man shall be a judge in his own cause. Therefore, where persons who have a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating it, the tribunal is improperly constituted and is without jurisdiction, and the court will grant an order of prohibition to restrain it from adjudicating, or an order of certiorari to quash a determination arrived at by it."
>
> "Any pecuniary interest, however small, in the matter in dispute disqualifies a person from acting as judge."

This Court should find that the Justices of the Supreme Court of Connecticut have acted in contra-

vention of the U.S. and Connecticut Constitutions' guarantees of due process and have violated the laws of Connecticut and the United States. (42 U.S.C. § 1983, 1985, and 18 U.S.C. § 241, 242 and Conn. General Statutes 51-39.

3. DID THE DISTRICT COURT ERR IN DENYING ITS OWN JURISDICTION IN A 42 U.S.C. SECTION 1983 ACTION PROPERLY REQUESTING INJUNCTIVE RELIEF FROM AN UNCONSTITUTIONAL ACT ON THE PART OF A STATE TRIAL COURT, WHICH ACT WAS CAUSING GREAT AND IMMEDIATE IRREPARABLE HARM TO THE PLAINTIFF?

Plaintiff Dacey was faced, in the retrial of his tort action in which he had previously been awarded $60,000 plus legal fees, with a trial judge, Henry J. Naruk, who was a member of the Defendant Connecticut Bar Association. Dacey was age 59 when the action was filed. He is now 72. Rather than wait through another years-long cycle in the state court appeals system, he elected to complain in the U.S. District Court, relying on the mandates in Monroe v. Pape, 365 U.S. 167 that the federal remedy was supplemental to, and not mutually exclusive of the state remedy, and that in Mitchum v. Foster 407 U.S. 242, in Section 1983 cases, the U.S. District Courts are not automatically barred from ordering injunctive relief from denials of due process in state civil court actions. Said the Mitchum court:

> "The very purpose of Section 1983 was to interpose the Federal Courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of

state law, 'whether that action be executive, legislative or judicial' Ex Parte Virginia, 100 U.S. at 346. Congress plainly authorized the Federal courts to issue injunctions in 1983 actions by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that Federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great immediate and irreparable loss of a person's constitutional rights. Ex Parte Young, 209 U.S. 123; cf Traux v. Raich, 239 U.S. 22; Dombrowski v. Pfister, 380 U.S. 479 (emphasis added)."

In support of its veneration of the principle of non-intervention, the Second Circuit cited Younger v. Harris, 401 U.S. 37, 46 (1971) -- with a significant omission. What the Younger court actually said was:

"The Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecution even irreparable injury is insufficient, unless it is 'both great and immediate.'... No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts.... It does not appear from the record that (petitioner has) been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith....In Baggett v. Bullitt, 377 U.S. 360 (1964), we enjoined state officials from discharging employees who failed to take certain loyalty oaths....Apart from the fact that any plain-

tiff discharged for exercising his constitutional right to refuse to take the oath would have no adequate remedy at law, the relief sought was of course the kind that raises no special problem -- an injunction against allegedly unconstitutional state action that is not part of a criminal prosecution.... Here the injury Harris faces is solely that incidental to every criminal proceeding. (emphasis added)."

It is clear that in Younger, this Court was considering the propriety of a federal injunction in the context of a state criminal proceeding. Harris had sought an injunction on the grounds that the state statute under which he was being prosecuted was unconstitutional. This Court was saying that a state has the right to make and enforce laws, and to prosecute those who violate them.

None of this has the slightest application to the two cases here at issue since they do not involve criminal prosecutions, but are civil matters which have become civil rights matters. To the contrary, Dacey has the right to expect that the state law concerning judicial disqualification will be enforced.

In affirming, the Second Circuit also cited Juidice v. Vail, 430 U.S. 327 (1977). That action, too, revolved around criminal contempt proceedings, and in Juidice, this Court's opinion was based upon the issue of whether a federal court should attempt injunctive intervention in an action brought by a state in the course of enforcing its criminal laws.

In Huffman v. Pursue, 420 U.S. 592 (1975),

also cited by the Second Circuit in support of its non-intervention position, "the action sought to be enjoined was for the abatement of a civil nuisance and therefore closely akin to a criminal proceeding." (Juidice v. Vail, supra)

In a concurring opinion on Juidice, Mr. Justice Stevens noted that

> "The major premise, underlying the Court's holding in Younger v. Harris is that a court of equity should not act when the moving party has an adequate remedy at law. Consistently with Younger, a court of equity may have a duty to act if the alternative legal remedy is inadequate. Indeed, the major premise underlying the Court's holding in Mitchum v. Foster, 407 U.S. 225, is a recognition of the unfortunate fact that state proceedings are sometimes inadequate to vindicate federal rights."

This Plaintiff-Appellant has no "adequate remedy at law," and the District Court does have a "duty to act" since no "adequate alternate legal remedy" is available.

> "Congress imposed the duty upon all levels of the federal juridicary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts...to guard, enforce and protect every right granted or secured by the Constitution of the United States....We yet like to believe that

> wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline to exercise that jurisdiction simply because the rights asserted may be adjudicated in some other form." Zwickler v. Koota, 389 U.S. 241, 248 (1967).

This is true notwithstanding the possibility of review by the Supreme Court of state court decisions, for:

> "Even when available by appeal rather than only by discretionary writ of certiorari, (that possibility) is an inadequate substitute for the initial District Court determination... to which the litigant is entitled in the federal courts." England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416 (1964)

In denying its jurisdiction, the U.S. District Court incomprehensibly cited Pierson v. Ray, 386 U.S. 547, although Dacey was not requesting money damages from the Justice Defendants but only an injunction requiring them to vacate their judgment and to recuse themselves in order that the case might be heard before judges not disqualified from sitting by membership in the Defendant Association.

In addition to Mitchum v. Foster, supra, this Court has upheld the legal principle that the benefits of comity, abstension and federalism do not prevent a federal district court from assuming jurisdiction in 1983 cases which might result in ordering injunctive relief from the acts of state courts, in the following decisions:

Amalgamated Clothing Workers v. Richman Bros. 1955, 75 S.Ct. 452, 455, 348 U.S. 511, 516

Baker v. Carr, 83 S. Ct. 691, 364 U.S. 186 (1962)

Berger v. U.S. 255 U.S. 22 (1921)

Board of Commissioners of Lake County v. Platt, 79 Fed. 567, 25 C.A.A. 87

Bradley v. Fisher, 13 Wall, 335, 347, (1872)

Commonwealth Coat Co. v. Continental Casualty Co. 89 S. Ct. 337 (1968)

Consumers Union v. Supreme Court of Virginia, No. 79-718, ___U.S.___

Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401

County of Allegheny v. Frank Mashuda Co., 1959, 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed. 2d 1163, noted 1963, Vander. L.Rev. 801

Cousins v. Eigoda, 92 S.Ct. 2610, 1972

England v. Louisiana Board of Medical Examiners, 1964, 84 S.Ct. 461, 374 U.S. 411

Ex Parte Virginia, 100 U.S. 346

Ex Parte Young, 209 U.S. 123

Home Tel & Tel v. City of Los Angeles, 1913, 33 S.Ct. 312, 227 U.S. 278

Hillsborough Township v. Cromwell, 1946 66 S. Ct. 445, 326 U.S. 620.

In Re Ayers, 8 S.Ct. 164

In Re Murchison, 349 U.S. 133, 136 (1955)

Javits v. Stevens, 382 F. Supp. 131 (1973)

Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U.S. 713, 84 S. Ct. (1459)

Lynch v. Household Finance, 92 S.Ct. 1113, 1972

Meredith v. City of Winter Haven, 1943, 64 S.Ct. 7, 320 U.S. 228

McNeese v. Board of Education, 83 S. Ct. 1433, 373 U.S. 668, (1963)

Rizzo v. Goode, 96 S.Ct. 598, 1976

Rondebush v. Hartke, 92 S. Ct. 804, (1972)

Shepard v. Maxwell, 384 U.S. 333, 83 S.Ct. (1966)

State of Louisiana ex Rel Purkey v. Ciolino 393 F. Supp. 102 (1975)

Trainor v. Hernandez, 97 S.Ct. 1911, (1977)

U.S. v. Livingston, D.C. S.C. 1959, 179 F. Supp. 9; affirmed 1961, 80 S.Ct. 1611, 364 U.S. 281, 4 L Ed. 2d 1719

Vendo Co. v. Electro Vend. Corp. 97 S. Ct. 2881 (1977)

This Court's attention is again respectfully drawn to Gibson v. Berryhill, supra, wherein it ruled that Section 1983 cases are the specific exemption Congress had in mind in enacting the ban on enjoinment of state court actions. Significantly, in Gibson this Court found that the state tribunal was disqualified from adjudicating the issues by reason of bias -- a situation on all fours with the instant cases.

As for the "fundamental policy against federal interference in on-going state court proceedings" cited by the Second Circuit, this Court's attention is also drawn to Dombrowski v. Pfister, 83 S. Ct. 1116, 380 U.S. 479, 1965, wherein a District Court in Louisiana heard a Title 42 Section 1983 case and dismissed it on jurisdictional grounds, whereupon the Supreme Court reversed, saying that the District Court had a right and duty to enjoin the state court's action.

The lower federal courts have relied upon Mitchum and accepted jurisdiction in the following cases, among others:

Sperry Rand Corp. v. Rothlein, C.A. 2d 1961, 228 F. 2d 245;

Anonymous J. v. Bar Ass'n. of Erie County C.A.N.Y.1975, 515 F 2d 435, certiorari denied 96 S.Ct. 71, 423 U.S. 840;

Matherly v. Lamb, D.C. Pa. 1976, 414 F. Supp. 364.

Classic Distributors, Inc. v. Zimmerman, D.C. Pa. (1974,) 387 F. Supp. 829

Federacion de Cooperatives de Credito de Puerto Rico v. Burgos, D.C. Puerto Rico 1973, 366 F. Supp. 1321

Golden Dawn Shops, Inc. v. Department of Housing and Urban Development, D.C. Pa. 1971 333 F. Supp. 874

Shaw v. Garrison, D.C. La. 1971, 328 F. Supp. 390, affirmed 467 F. 2d 113, certiorari denied 93 S. Ct. 467, 409 U.S. 1024, 34 L. Ed.2d 317

Duke v. State of Texas , D.C. Tex 1971, 327 F. Supp. 1218, reversed on other grounds 477 F.2d 244, rehearing denied 478 F.2d 1402, certiorari denied 94 S. Ct. 1565, 415 U.S. 978.

In Adams v. Sampson, ___ F.Supp.___, (D. C. N.H. 1979) six petitioners convicted of criminal contempt in the state courts and sentenced to serve six months prevailed in the U.S. District Court and were freed. In Younger v. Colorado State Board of Bar Examiners, 79-M-645, a U.S. District Judge struck down a Colorado Supreme Court rule that closed the state bar examination to applicants who had flunked it three times. The U.S. District Court in Massachusetts accepted jurisdiction in Haley v. Troy, 338 F. Supp. 794, 1972, and issued an order that a Massachusetts trial judge had denied due process to the litigants. Again in Massachusetts, U.S. District Judge W. Arthur Garrity accepted jurisdiction in Howard v. Kunin, C.A. 73-3813-G, December 3, 1973, unreported, ordered a hearing on a Temporary Restraining Order against a state trial court and dissolved the attachment on Howard's house, enabling Howard to sell it and obtain needed medical treatment. In the instant action, Plaintiff

Dacey's age and ill health provide a parallel "great and immediate irreparable harm" and constitute a basis for invoking the Magna Carta's maxim that "Justice delayed is justice denied," (Article 40), justifying injunctive relief in the pending state court civil case Dacey v. Connecticut Bar Association.

As held in Harmon v. Superior Court of California, 207 F. 2d 796, (1962), "A claim under the civil rights act expressly gives the District Court jurisdiction, no matter how imperfectly the claim is stated."

It should not be necessary to invoke a law to obtain the disqualification of a judge whose impartiality is questioned; a decent regard for judicial ethics and legal tradition should be sufficient. In the instant action, Dacey had defeated the Connecticut Bar Association in an action with great emotional overtones. Over the vigorous protest of Dacey's counsel (who later served with distinction as a judge of the Connecticut Superior Court) the Connecticut Supreme Court had earlier issued a libelous ruling that Dacey had engaged in "sordid activities," an opinion which a leading professional journal ascribed editorially to pure ignorance upon the Court's part. There can be no question of the Connecticut Justices lack of impartiality. (See Appendix

The five Connecticut Supreme Court Justices and the retrial judge are all members of the defeated Connecticut Bar Association and were liable to Dacey in money damages. The state law forbade their sitting in judgment, but they defied state law. Because of the twelve-year delay and

the prospect of still more judicial frustration of the statute, Dacey exercised his rights under two laws passed by the Congress of the United States in anticipation of just such difficulties with overbearing state judges -- 42 U.S.C. Sections 1983 and 1985, and 28 U.S.C. Section 2283. The exemption clause in Section 2283 gave the District Court jurisdiction in Dacey v. Naruk and that Court should not have denied him relief. Such denial is reversible error.

As justification for its refusal to accept jurisdiction, the District Court cited Rooker v. Fidelity Trust Co., 263 U.S. 14 (1923) wherein it was held that when a state court has proper jurisdiction over a matter and constitutional claims are raised therein, it is the provice and duty of the state court to decide those claims.

The key words in the Rooker decision are "proper jurisdiction." In Dacey v. Connecticut Bar Association, the present members of the Connecticut Supreme Court have no "proper jurisdiction," all being unarguably disqualified by both state statute, the Canons of Judicial Ethics, and constitutional law. If a court consists of disqualified judges, there is no court - it is coram non judice. Gruman v. Raymond and Betts, 1 Conn. 40,(1814). If this Court is to give weight to the argument advanced in Rooker, then it must address itself to the question: "Do the justices of the Connecticut Supreme Court have proper jurisdiction in Dacey v. Connecticut Bar Association?"

What is jurisdiction?

(a) "Jurisdiction" is the right of a tribunal to ex-

ercise its power with respect to a particular matter (emphasis added)." Ballantine's Law Dictionary, p. 690.

However valid may be the court's right to exercise power over a general class of matters which might be presented for its attention, the individual justices lack the power or authority to adjudicate a particular matter, Dacey v. Connecticut Bar Association. Lacking the right to exercise power over that particular matter, they lack jurisdiction over it.

(b) "The test of the jurisdiction of a court is whether or not it has power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong (emphasis added)." Board of Commissioners of Lake County v. Platt, 79 Fed. 567, 25 C. C. A. 87

The Connecticut statute specifically disqualifies the respondent justices from entering upon the particular inquiry in Dacey. Having no power to enter upon the inquiry, they lack jurisdiction.

(c) "[Jurisdiction] is the right of a judge to pronounce a sentence of the law on a case or issue before him (emphasis added)." In Re Ferguson, 9 Johns N. Y. 239; Hopkins v. Com., 3 Metc. (Mass.) 451.

The Connecticut statute states that the justices have no right to act on the particular case before them. Lacking that right, they lack jurisdiction over the particular case before them.

(d) "[Jurisdiction] is the right to adjudicate

concerning the subject matter in the given case (emphasis added)." Reynolds v. Stockton, 140, 254, 268 11 Supp. Ct. 773

In the "given case" here involved, Dacey, the individual justices are prohibited by statute from sitting in judgment, and being prohibited, they lack "the right to adjudicate," meaning that they lack jurisdiction.

(e) "Jurisdiction" is authority to decide the case either way (emphasis added)." The Fair v. Speciality Co., 228 U.S. 22, 25, 33 S. Ct. 410

In the matter here at issue, the justices are by law denied the right to decide the case either way. Thus, according to this Court's standards, they lack jurisdiction.

(f) "No agreement between individuals can empower a court to do an act which it is, by rules made under a statute, forbidden to do (emphasis added)." 1896 I. O. B. 35.

Here we are told that if a statute forbids judges to perform an act, no "agreement" (e.g. the "special resolution" purporting to provide a remission of dues) can empower them to perform the act of sitting in judgment. On the appeal in Dacey, the Defendants lack jurisdiction in the matter.

(g) "[Jurisdiction] is the power to hear, determine and adjudicate (emphasis added)." 76 SD 210 75 NW 2d 641, 644

The justices obviously do not have jurisdiction in Dacey, for they are expressly deprived by

statute of the "power to hear" a case in which they are among the defendants liable to contribute to the damages and costs. Being deprived of that right, they lack jurisdiction.

In Gruman v. Raymond and Betts, supra, which involved a successful suit for damages against a judge who had issued an illegal warrant, an earlier Connecticut Supreme Court held that:

> "There must be a jurisdiction of the process as well as of the person and cause. Where there is want of jurisdiction over the cause, it is the same as though there were no court. It is coram-non-judice.... Although here the justice had jurisdiction over the subject matter, yet he had no jurisdiction over the process (emphasis added)."

The District Court has stated in its judgment that it has no authority to "review" a decision of a state court. In Gruman, the state court ruled that there is no process sanctioned by law in which a disqualified judge may serve on the bench. To equate the position of the five Defendant Justices here with "proper jurisdiction" is to rule that they are qualified, a finding that conflicts with Gruman.

The District Court cited Rooker as holding that even if what the state court did was wrong, its judgment was still valid and beyond appeal. The Court's argument appears to be that an illegitimate conspiracy can produce a legitimate end.

In Pierson v. Ray, supra, Justice Douglas made the significant point that:

> "The intention to deprive a person of his

civil rights is wholly incompatible with the judicial function. When a judge intentionally and knowingly deprives a person of his constitutional rights, he exercises discretion or individual judgment; he acts no longer as a judge, but as a 'minister' of his own prejudice (emphasis added)."

The five defendant justices propose to rule whether each of them and each of their associates in the defendant Association, must reach down into his pocket and come up with a sum of money which a lower court jury had earlier ordered him to pay to the Plaintiff. Can it be said that in refusing to obey the Connecticut statute requiring them to disqualify themselves, these Defendants are not a "minister of their own prejudices?" Is this Court prepared to tolerate the Defendants' unconscionable violation of the Code of Judicial Ethics and the civil rights secured to the Plaintiff under both state and federal law?

When Dacey v. Naruk was filed, it was originally assigned to District Judge H. Gilroy Daley, a member of the Connecticut Bar Association. In recusing himself, Judge Daley stated that he was doing so "in the interest of justice," a recognition of his disqualification under the statute. If he was disqualified, Judge Naruk was equally disqualified from hearing Dacey v. Conn. Bar Association.

As to the District Court's citation of Rooker supra; aside from the fact that the case cited was not a civil rights matter under Section 1983, as is Dacey, the Plaintiff/Appellant questions the citing of a 1920 decision while passing over the historic 1961 case of Monroe v. Pape, 365 U.S. 167, 183, 81

S. Ct. 473, wherein the United States District Court for the District of Northern Illinois ruled that Monroe could move against Pape and the State of Illinois on the grounds that his civil rights had been violated by orders issued by state courts. The Supreme Court found that Monroe could move against the individual state employees who had deprived him of his civil rights.

As to the District Court's citation of Anderson v. Lecon Properties, Inc. 457 F.2d 929 (1972) and Tang v. Appellate Division of N.Y. Supreme Court, 487 F.2d 138 (1973); the circumstances of these actions have significant difference from those in Dacey v. Cotter, et al. In Anderson, both parties freely acknowledged that the Minnesota state court had jurisdiction. In Dacey, the Plaintiff has indisputably shown that the five individuals comprising the Supreme Court of Connecticut are disqualified by law and therefore are without jurisdiction. Their claim of jurisdiction is thus a fraudulent one. Anderson involved no such claims of disqualification.

Tang, on the other hand, was dismissed because the plaintiff, having been denied his rights in a lower court, took an appeal to the appellate state court. Rejected there, he chose not to carry his case to the New York Court of appeals, the state's highest court. Instead, he filed a 1983 action in the Federal District Court. That court ruled that since he had elected to litigate the constitutional issue in the state appellate court, he was obliged to accept the decision of that court. If he had chosen to go directly to the District Court on constitutional grounds after his rejection in the lowest state court, the Second Circuit found, the

District Court would have had jurisdiction. In Dacey, the Plaintiff did not appeal the constitutional issue to any state court. Indeed, there was no state court to whom it could be appealed. Instead he went directly to the District Court -- exactly what he was, by law, supposed to do.

As to the District Court's contention that only the U.S. Supreme Court has authority to intervene in state court matters, the Supreme Court observed in Mitchum v. Foster, supra, that "The very purpose of Section 1983 was to interpose the the Federal Courts between the states and the people, as guardians of the peoples' federal rights, etc." Significantly, the Supreme Court used the term "federal courts," a plural form, which clearly indicated that the reference was to the district courts and not to the Supreme Court itself. The "federal injunctive relief" to which the decision refers would, of course, have to originate in the district courts.

Title 28, Section 1443 of the U.S. Code provides that when any state fails to provide equal protection under its law, the damaged party may cause the action to be removed to the U.S. District Court. If, as a result of the applicability of Section 51-39 of the Connecticut General Statutes, any judge of the Connecticut courts has ever recused himself in the interest of providing justice to a litigant -- and the Plaintiff/Appellant has already cited numerous instances where the Justices of the Connecticut Supreme Court have recused themselves and given way to substitutes drawn from the lower courts -- and the Defendants here do not similarly recuse themselves, this Plaintiff will not have received equal protection under the law, and under Title 28 Section 1443, his civil rights will have been

violated.

It is settled that it is the duty of the District Court to uphold any state law which it does not consider unconstitutional. No claim has ever been made that Section 51-39 of the Connecticut General Statutes is unconstitutional, being intended to protect Connecticut citizens' right to due process. Ergo, in the absence of a state court to whom the Defendants' violation of the state law can be referred, it is the duty of the federal district court to uphold the Connecticut law, first assuming jurisdiction.

The U.S. District Court should have protected Dacey's property right under the 14th Amendment to his enjoyment of the $60,000 judgment awarded by the first jury, by enjoining the trial judge from enforcing his order based upon the judgment of the illegally-constituted state court in favor of the Defendant Bar Association.

In holding that it had jurisdiction over a § 1983 action for money damages for the purpose of dismissing it on the grounds of judicial immunity but that it had no jurisdiction to consider the merits of a request for injunctive relief, the District Court committed reversible error. In United States v. McLeod, 385 F 2d 734, 738 n (5th Cir. (1967) it was held that while judges are immune from liability for damages in suits under 42 U.S.C. Section 1983, that does not mean that they may not be enjoined from pursuing a course of unlawful conduct. See also Javitz v. Stevens, 382 F. Supp. 131 (1973); Mills v. Larson, 56 F. R. D. 63 (1972); State of Louisiana Ex Rel Purkey v. Ciolino, 393 F. Supp. 102 (1975), and Saffioti v. Wilson, 392 F. Supp. 1335 (1975)

In State Ex Rel Brockman v. Proctor, 298 N. E.

2d Ohio 532 (Ohio 1973), it was held that "a fair trial in a fair tribunal is the basic requirement of due process." It should have been obvious to the District Court that it had a duty to protect Dacey's right to such a fair tribunal by enjoining the state courts from depriving him of due process.

In another historic case, In Re Ayers, 8 S.Ct. 164, 123 U.S. 443, this Court laid down the doctrine that federal action against a state officer was not barred where his action was a wrong simply as an individual act. In Dacey v. Cotter et al, the Defendants' violation of a state law specifically directed at controlling the conduct of judges is a wrong within the meaning of Ayers, and each of the five Defendants, called upon individually to refrain from such violation, has indicated an intention to proceed with it. This despite the fact that the acts which Dacey seeks to have enjoined are strictly forbidden by the state. Only federal injunctive relief can prevent the doing of that which should not be done. It is beyond question that the deprivation of Dacey's rights is unconstitutional. If this Court recognizes that it is unconstitutional and contrary to unchallenged state law, how can it do otherwise than reverse the District Court and order it to hear the case on its merits?

In Meredith v. City of Winter Haven, 64 S.Ct. 7, 320 U.S. 228, (1943), the District Court dismissed the action on the merits, but the Court of Appeals ordered that the dismissal be on abstention grounds. The U.S. Supreme Court reversed and ordered the lower court to reinstate the complaint and decide the case, Chief Justice Stone holding that:

"The difficulties of ascertaining what the

state courts may hereafter declare the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for a decision."

Failure to act (state inaction) to protect civil rights is denial of due process and actionable under Section 1983. Kauper, Civil Liberties and The Constitution, U. Of Michigan Press, Chapter 4, p. 129.

This Court ruled unanimously in Napue v. Illinois, (1959) 69 S. Ct. 1173, 1178, 360 U.S. 264, 271 that:

"The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate."

The Roscoe Pound-American Trial Lawyers Foundation, made up of 50 law professors, deans, bar presidents, legislative leaders and journalists, has claimed that this Court has allowed the erosion of individual rights by giving too much deference to state courts.

In "The Courts: The Pendulum of Federalism," (1979), the Foundation asserted that the Court has "inappropriately used deference to state courts as a 'smoke screen' in dealing with issues of habeas corpus, due process and civil rights. We are alarmed at decisions that fail to define or enforce individual rights and liberties in the name of deference to state and local institutions of govern-

ment. In recent years the Supreme Court has not lived up to its obligation to assure that it and the lower federal courts afford adequate redress for claims of violation of federal rights."

Plaintiff/Petitioner has presented a wealth of case history from this Court and Circuit Courts of Appeals confirming that by all the standards of the past, (a) he has been denied due process by the Defendants, and (b) in dismissing the action in the case of Dacey v. Naruk and in denying jurisdiction in the case of Dacey v. Cotter, et al, the District Courts have not only been inconsistent but both have erred.

That there has been judicial impropriety in Connecticut is clear. That it has involved the deprivation of constitutional rights is equally clear. Can this Court put its imprimatur on such legal wrong-doing?

* * *

Pursuant to 28 U.S.C. Section 46 (c) the Plaintiff/Petitioner respectfully requests that in view of the constitutional issues here involved, this Petition for Certiorari be granted.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

NORMAN F. DACEY
Petitioner

v.

JOHN P. COTTER, JOSEPH W. BOGDANSKI,
ALVA P. LOISELLE, JOSEPH S. LONGO
and ELLEN A. PETERS
Respondents

and

NORMAN F. DACEY
Petitioner

v.

HENRY J. NARUK
Respondent

APPENDIX TO

PLAINTIFF/APPELLANT'S BRIEF

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NORMAN F. DACEY
510-A HERITAGE VILLAGE
SOUTHBURY, CONNECTICUT 06488
TEL. (203) 264-4440

March 10, 1977

Honorable John P. Cotter
Chief Court Administrator
Drawer N
Station A
Hartford, Conn. 06106

Dear Judge Cotter:

I am the plaintiff in an action against the Connecticut Bar Association which has long been in litigation. On April 6, 1976, the Connecticut Supreme Court remanded it for retrial and it has been on the "ready" list in Bridgeport since September.

The lengthy litigation has been complicated by the fact that every member of the judiciary who has been called to act in connection with it has been debarred by Connecticut General Statute 51-39 from sitting in judgment on the case by reason of the fact that they were themselves members of the defendant bar association and thus liable to contribute to the damages and costs of the action.

On Tuesday, March 1, at the call of jury cases in Bridgeport before Judge Irving Levine, counsel for the defendant bar association moved for a continuance of at least six months on the grounds that the defendant could not obtain a fair trial in Bridgeport because of the newspaper, radio and television publicity which has attended the hearings. Judge Levine, noting the fact of his own disqualification to act on the motion by reason of his membership in the defendant association, assigned the motion for a hearing before Judge Ellen B. Burns, then sitting on the court side in Bridgeport. Judge Burns is not a member of the bar association.

Judge Burns has just ruled that there is not sufficient evidence to support the motion for continuance, and has denied it. The matter is therefore now ready for trial, being third on the list. Judge Levine being the only one sitting on the jury side, the question of his disqualification must now arise again.

In view of the unusual circumstances, the recurring problem of disqualification, and the fact that the matter has now been in litigation for an entire decade, may I respectfully ask Your Honor if it would not be possible to assign Judge Burns, as the only member of the judiciary not prohibited by statute from hearing the case, to sit on the matter?

Trial being imminent, I respectfully bespeak Your Honor's early consideration of my request.

Very truly yours,

Norman F. Dacey

A-1

STATE OF CONNECTICUT
SUPREME COURT

CHAMBERS OF
JOHN P. COTTER
JUSTICE
CHIEF COURT ADMINISTRATOR

March 17, 1977

HARTFORD

Mr. Norman F. Dacey
516-A Heritage Village
Southbury, Connecticut 06488

Dear Mr. Dacey:

I have just received your letter of March 10, 1977 concerning a retrial of Dacey v. Connecticut Bar Assn., 170 Conn. 521.

There are a number of judges who are not members of the Connecticut Bar Association who would be in a position to try this case. I am, therefore, sending a copy of your letter to the Honorable Irving Levine, Acting Administrative Judge of the Superior Court in Fairfield County at Bridgeport to resolve this matter.

I would also suggest that the attorneys who represent you discuss this matter with Judge Levine so that it may be reached for a trial as quickly as possible.

Very truly yours,

John P. Cotter
Justice
Chief Court Administrator

JPC/fcc

cc: Hon. Irving Levine

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U.S. DISTRICT COURT
BRIDGEPORT, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NORMAN F. DACEY :

V. : CIVIL NO. B-77-269

HENRY J. NARUK :

ORDER

Following this Court's sua sponte dismissal of plaintiff's complaint against defendant on grounds of absolute judicial immunity, plaintiff has moved to alter or amend the judgment and for leave to file an amended complaint. The amended complaint contains two damage claims and three claims that purport to seek equitable relief. The damage claims, allegedly grounded on federal antitrust provisions, still encounter the bar of judicial immunity since the only actions of defendant alleged to create personal liability are actions taken in a judicial capacity in the course of adjudicating a lawsuit. While equitable claims do not encounter the bar of judicial immunity, the claims alleged by plaintiff manifestly do not state claims on which relief can be granted. One claim seeks an order for jury trial in this case, a "claim" obviously dependent on the existence of some valid claim for ultimate relief somewhere in the complaint. Another claim seeks assignment of plaintiff's state court action against the Connecticut Bar Association for retrial in the state courts. This Court has no appellate jurisdiction over the state courts

and no jurisdiction to order such a retrial. Finally, plaintiff seeks an order that the judgment in his state court action against the Connecticut Bar Association be "quashed" and that the defendant state court judge be enjoined from enforcing that judgment. Such a claim is a transparent attempt to have this Court exercise a non-existent appellate function with regard to the state court proceedings.

So that plaintiff's record in this Court will be complete, the plaintiff's Motion for Leave to Amend Pleading (i.e., file an amended complaint) is granted, the Motion to Alter or Amend Judgment is denied, and, solely to be sure that plaintiff's procedural maneuvers have not inadvertently defeated his federal appellate rights, the Clerk of this Court is directed to enter an additional judgment dismissing the action.

Dated at Hartford, Connecticut, this 18 day of November, 1977.

Jon O. Newman
United States District Judge

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NEW HAVEN, CONN.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

- - - - - - - - - - - - - - x

NORMAN P. DACEY, :

Plaintiff, : CIVIL ACTION No. B-77-269

vs. :

HENRY J. NARUK, : MEMORANDUM

Defendant. :

- - - - - - - - - - - - - - x

MURPHY, D.J.

Defendant's motion to dismiss is granted. Dacey v. Dorsey, 568 F.2d 275 (2nd Cir. 1978); Dacey v. House, 573 F.2d 1289 (2nd Cir. 1977); Scarrella v. Midwest Federal Savings and Loan, 536 F.2d 1207, 1209 (8th Cir.), cert. denied, 429 U.S. 885 (1976); Stump v. Sparkman, 435 U.S. 349 (1978), reh. denied, 98 S.C. 2862; Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

Thomas F. Murphy
Senior United States District Judge

Dated: March 9, 1979.

RECEIVED
MAR 15 1979
ATTORNEY GENERAL'S OFFICE
UNIT I

NO. 8716

Norman F. Dacey

vs.

Connecticut Bar Association

SUPREME COURT
STATE OF CONNECTICUT
July 24, 1979

ORDER

The plaintiff/appellant's Motion for Recusal having been presented to the court

it is hereby

ORDERED denied.

By the Court,

Thomas H. Brahan

CHIEF CLERK OF
SUPREME COURT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN

NORMAN F. DACEY,

Plaintiff,

-vs-

JOHN P. COTTER, et als,

Defendants.

Civil No. B-79-338

ORDER

In the interest of justice and with Judge T. Emmet Clarie's consent, this case hereby is transferred to the docket of Judge Clarie.

It is so Ordered.

Dated at Bridgeport, Connecticut this 6th day of September, 1979.

T. F. GILROY DALY
United States District Judge

MICROFILM
SEP 7 1979

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

OCT 5 2 30 PM '78
U.S. DISTRICT COURT
NEW HAVEN, CONN.

NORMAN F. DACEY :

v. : CIVIL NO. B-79-338

JOHN P. COTTER, ET AL :

MEMORANDUM OF DECISION

This action, brought under 42 U.S.C. §1983, seeks a mandatory injunction to prevent the hearing by the defendant justices of the Supreme Court of Connecticut of the plaintiff's appeal from an adverse judgment in the re-trial of his libel suit against the Connecticut Bar Association.

Plaintiff claims that the membership of the justices in the Connecticut Bar Association, together with their possible liability on any award of damages and costs, requires that court to recuse itself under the provisions of C.G.S. §51-39.[1/] He alleges that the court denied his motion that it do so, and that the court's failure to recuse will deprive him of his constitutional right to a fair trial.

Pending before this court are plaintiff's motion for a preliminary injunction and motion for disqualification, the latter the question of whether the office of the state's attorney general may properly represent the judges of the state Supreme Court. These motions need not be addressed however, since the court finds that it has no jurisdiction to decide this matter.

Defendants urge some interesting arguments that the injunction should not issue. They point to Dacey v. House, Civil No. B-76-146 (D. Conn. Feb. 18, 1977) (ruling on defendants' motion to dismiss) and Dacey v. House, Civil No. B-76-146 (D. Conn. May 17, 1977)

(denial of motion for amendment or alteration of judgment under rules 59-60 of the Federal Rules of Civil Procedure) and urge that Judge Zampano's dismissal of the claim for damages based on the same arguments as presented here and his denial without written opinion, of the motion to amend to add a claim for injunctive relief constitute a decision on the merits that injunctive relief is not warranted. Citing Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1233 (2d Cir. 1977) they contend that the defendants here are "in substance [persons] whose interests were at stake in the prior litigation" (which involved the then justices of the Connecticut Supreme Court) and thus the doctrine of res judicata bars the relief requested here.

Defendants also point to the statement of the Second Circuit in Dacey v. Dorsey, 568 F.2d 275, 277 (2d Cir. 1978) where the court declined to decide whether a party, at whose instance recusal is sought and denied, ever has a claim under the civil rights statute. Instead, the Second Circuit noted that, when plaintiff Dacey asked the Connecticut Supreme Court to recuse itself from hearing the Bar Association's appeal of Dacey v. Connecticut Bar Ass'n., 170 Conn. 520 (1976), there was no other forum available for the State Court appeal. Citing Evans v. Gore, 253 U.S. 245, 247-48 (1920), the Second Circuit said in effect that recusal was unnecessary: "When all are disqualified, none is disqualified." Defendants argue that this is still the law of this Circuit.

This court finds, however, that it may not consider these arguments because it lacks subject matter jurisdiction over the matter in controversy. The reason for

this is the nature of the relief sought, a mandatory injunction prohibiting the Connecticut Supreme Court from hearing the matter, on the ground that a fair hearing before them is impossible.

Coming, as this action does, after a decision by the Connecticut Supreme Court that its hearing the case would not be improper, it amounts, in effect, to a request to this court to review that decision of the Connecticut Supreme Court. In this, it is very like the instant plaintiff's attempt in Dacey v. Naruk, Civil No. B-77-269 (D. Conn. Nov. 21, 1977) to have the District Court quash the verdict of the Superior Court in the re-trial of plaintiff's libel suit, on the ground that Judge Naruk's refusal to recuse himself because of his membership in the Connecticut Bar Association amounted to a denial of plaintiff's civil rights. In his decision on plaintiff's motion to alter or amend judgment in Naruk, Judge Newman characterized the motion as "a transparent attempt to have this Court exercise a non-existent appellate function with regard to the state court proceedings." Slip op. at 2.

The United States Supreme Court held in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), that, when a state court has proper jurisdiction over a matter and constitutional claims are raised therein, it is the province and duty of the state court to decide those claims.

If the decision of the state court is wrong, that does not void the validity of the judgment and "[u]nder the legislation of Congress, no court of the United States other than this Court [i.e. the United States Supreme

Court] could entertain a proceeding to reverse or modify the judgment for errors of that character." 263 U.S. at 416.

The principle that federal courts of inferior jurisdiction have no jurisdiction to review alleged errors in state court judgments has been held to apply to §1983 cases where the state court action is attacked as unconstitutional, even if the constitutional issue was not raised in the state court. Anderson v. Lecon Properties, Inc., 457 F.2d 929 (8th Cir. 1972) cert. den. 409 U.S. 879 (1972) cited with approval in Tang v. Appellate Division, 487 F.2d 138, 142 (2d Cir. 1973), cert. den. 416 U.S. 906 (1974);

Therefore, this court does not have jurisdiction to hear this action, which is in the nature of an interlocutory appeal; the proper forum is ultimately the United States Supreme Court. It should be noted that in this matter of jurisdiction, this case is distinguishable from Dacey v. Dorsey, Civil No. B-76-190 (D. Conn. Feb. 18, 1977), aff'd 568 F.2d 275 (2d Cir. 1978), Dacey v. Naruk, Civil No. B-77-269 (D. Conn. Jan. 31, 1978), and Dacey v. House, Civil No. B-76-146 (Feb. 16, 1977), aff'd 573 F.2d 1289 (2d Cir. 1977), all cases in which this court had jurisdiction. In Dacey v. Dorsey, the District Court was not faced with effective overruling of a state court action. Instead, the complaint sought damages and injunctive relief for the alleged failure of a United States Attorney to investigate or otherwise act upon a complaint of unconstitutional action by the Connecticut Supreme Court.

In both Dacey v. Naruk and Dacey v. House, the

District Court was initially presented with a §1983 claim for damages against the Connecticut Supreme Court for allegedly unconstitutional action. Of course, the state court is immune from a suit for damages, but this court has jurisdiction to so declare because seeking damages for an action of a court is not the same as seeking to require the court to rule differently or not to act on its ruling. Only when the latter is sought, is the District Court in the position of a potential appeals court and thus only then is it lacking in jurisdiction.

When plaintiff sought to amend to add injunctive relief in Naruk, Judge Newman denied the amendment for the reasons stated herein -- an attempted exercise of non-existent appellate jurisdiction. Civil No. B-77-269 (D. Conn. Nov. 21, 1977).

When injunctive relief was sought to be added in House, Judge Zampano denied the motion without opinion. Civil No. B-76-146 (D. Conn. May 17, 1977).

It should be clear from this discussion that the outcome in the instant case would not have been different had plaintiff sought both damages and injunctive relief. The damage claim would have given the court jurisdiction only on the damage issue; that jurisdiction would not have extended to allow this court to consider the request for injunctive relief.

Accordingly, the action is dismissed for lack of subject matter jurisdiction.

SO ORDERED

ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 5th day of October, 1979.

F O O T N O T E

1/ Disqualification by relationship or interest. Judge may act with consent of parties. When there is so near a relationship between any judge and any party in any proceeding in court before him, as between father and son, brothers or uncle and nephew, by nature or marriage, or landlord and tenant; or when any judge may be liable to contribute to the damages, costs or expenses or any such proceeding, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act, except as herein provided. No judge shall be disqualified to act in any proceeding by reason of his being a member of any ecclesiastical corporation, unless it is a party to the action, nor in any proceeding in which any town, city or borough is a party or interested, by reason of his being an inhabitant thereof or liable to taxation therein or by reason of his being related to any taxpayer or inhabitant thereof. When any judge is disqualified to act in any proceeding before him, he may act if the parties thereto consent in open court.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of March one thousand nine hundred and eighty

Present: HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE WILLIAM H. TIMBERS,
Circuit Judge.

HONORABLE HENRY F. WERKER,
District Court Judge, sitting by designation.
~~Circuit Judge~~

NORMAN F. DACEY, Plaintiff-Appellant v. HENRY J. NARUK, Defendant-Appellee	79-7657
NORMAN F. DACEY, Plaintiff-Appellant v. JOHN P. COTTER, JOSEPH W. BOGDANSKI, ALVA P. LOISELLE, JOSEPH S. LONGO, ELLEN A. PETERS, Defendants-Appellees	79-7857

79-7657
79-7857

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel for appellees and by appellant pro se.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby are affirmed.

Appellant has failed to allege facts sufficient to overcome the "fundamental policy against federal interference" in ongoing state court proceedings. Younger v. Harris, 401 U.S. 37, 46 (1971); accord, Huffman v. Pursue, 420 U.S. 592 (1975); Judice v. Vail, 430 U.S. 327 (1977). This court has indicated previously that appellant's constitutional allegations state "no claim

cognizable in the federal courts." Dacey v. Dorsey, 568 F.2d 275 (2d Cir.), cert. denied, 436 U.S. 906 (1978). Accordingly, the district courts were without jurisdiction to award the relief requested. See Rooker v. Fidelity Trust Co., 263 U.S. 412 (1923).

IRVING R. KAUFMAN, Chief Judge.

WILLIAM H. TIMBERS, Circuit Judge

HENRY F. WERKER, District Judge.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 24, 1980

Norman F. Dacey
89 Grovers Ave.
Bridgeport, CT 06605

RE: Norman F. Dacey
v. Henry J. Naruk, et al.
No. 79-1300

Dear Mr. Dacey:

The Court today entered the following order in the above-entitled case:

The motion for leave to file a petition for writ of mandamus is denied.

Very truly yours,

Michael Rodak, Jr., Clerk

Michael Rodak, Jr.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of May , one thousand nine hundred and eighty

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. HENRY R. WERKER
District Judge

NORMAN F. DACEY Plaintiff-Appellant v. HENRY J. MARUK Defendant-Appellee	79-7657
NORMAN F. DACEY Plaintiff-Appellant v. JOHN P. COTTER, JOSEPH W. BOGDANSKI, ALVA P. LOISELLE, JOSEPH S. LONGO and ELLEN A. PETERS individually and in their capacity as Justices of the Supreme Court of Connecticut Defendants-Appellees	79-7658

A petition for a rehearing having been filed herein by plaintiff-appellant pro se.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

BEST COPY AVAILABLE

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the Foley Square Court House, in the City of New York, on the [illegible] day of May, one thousand nine hundred and seventy-eight.

[illegible]

Plaintiff-Appellant

v

[illegible] 78-7557

Defendant-Appellee

[illegible]

Plaintiff-Appellant

v

[illegible] 78-7587

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by the plaintiff-appellant pro se, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge